

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

Corrected Copy

77-1065

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN TARKO and ROBERT MYLAN,

Appellants.

-----x

To be argued by
DAVID W. McCARTHY, ESQ.
(15 minutes)

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BRIEF FOR APPELLANT JOHN TARKO

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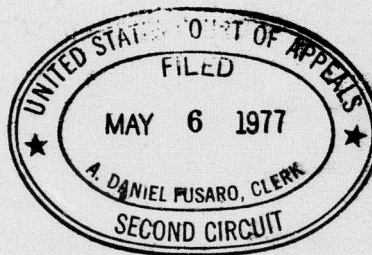


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QUESTIONS PRESENTED

1. Does the defendant-appellant Tarko have standing to contest the search and seizure of checks from the defendant-appellant Mylan?
2. Was the search warrant issued upon probable cause?

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PRELIMINARY STATEMENT

Indictment 76 Cr 467 charged Robert Mylan and John Tarko with thirteen counts of "receiv[ing], conceal[ing] and retain[ing]" checks which were stolen property of the United States (Title 18 U.S.C. §641 and §2) and one count of conspiracy to "possess, conceal and retain" United States Treasury checks stolen from the United States mail "with intent to convert [them] to their own use, "knowing the same to have been stolen." (Title 18 U.S.C. §371, 641 and 1708).

A motion to suppress was filed seeking the suppression of the checks which had been physically seized from co-appellant Mylan.*

* A second prong of the motion was the suppression of statements allegedly made by the appellant. They are not in issue here as no hearing was held upon that claim and this Court's decision herein will substantially effect any District Court conclusion as to the arguments raised regarding the statements e.g. as "fruit of the poisoned tree.", in the event of a reversal.

No hearing was held, and the issue was submitted upon the moving papers and the search warrant and the supporting affidavit. In an unreported opinion (Appendix D), Chief Judge Jacob Mishler denied the motion.

On November 22, 1976, the appellant pleaded guilty to the first count of the indictment--possession of stolen Government checks. Preservation of right to appeal from the adverse ruling of Chief Judge Mishler was consented to by the Government and the Judge.

On January 28, 1977, Mr. Tarko was sentenced to incarceration pursuant to the Youth Corrections Act (Title 18 U.S.C. §5010 (b)), but continued upon bail pending disposition of this appeal. Notice of appeal was duly filed and David W. McCarthy was continued as counsel on appeal pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

On June 1, 1976, co-appellant Robert Mylan was driving his automobile in the vicinity of LaGuardia Airport when Agents of the Federal Bureau of Investigation stopped him, searched his vehicle, and seized approximately two hundred eighty thousand dollars (\$280,000) worth of Government checks. The FBI agents' authority for this action was a search warrant which had been signed by Magistrate Vincent A. Catoggio on June 1, 1976 at

2:18 p.m. (Appendix E). The search warrant was issued upon the affidavit of FBI Agent Eugene L. Crouch. (infra, p. 3)

On July 1, 1976, the appellant John Tarko was arrested; subsequently he was charged with receiving, concealing and retaining the stolen checks with intent to convert them to the use of Mr. Mylan and himself. Additionally, he was charged with conspiracy to possess, conceal, and retain the stolen checks.

Both defendants filed motions to suppress the seized evidence (Appendices F & G). No hearing was held, but the legality of the search warrant was determined upon the papers submitted and the affidavit seeking the warrant. Accordingly, the text of the affidavit is set forth hereafter.

AFFIDAVIT FOR A SEARCH WARRANT

EUGENE L. CROUCH, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Your deponent has reason to believe that there is presently being possessed, concealed and retained in the vehicle known and described as a 1975 Lincoln, bearing New Jersey license plate number 777CYS, approximately Two Hundred and Eighty Thousand Dollars (\$280,000.00) in stolen negotiable United States Government checks in violation of Title 18, United States Code, Section 641.

The source of your deponent's information and the grounds for his belief are:

(1) A confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past which information has led directly to the recovery of a total in excess of Seventy Thousand Dollars (\$70,000.00) in stolen negotiable securities, advised that on April 29, 1976, Robert Mylan, a resident of South New Jersey, who drives a 1974 or 1975 yellowish green Lincoln bearing New Jersey license number 777CYS, had in his possession approximately Five Hundred Thousand Dollars (\$500,000.00) worth of stolen United States Government checks, a portion of which he was attempting to sell to a prospective buyer in New York City.

(2) During the week of May 3-7, 1976, the confidential informant advised that Robert Mylan made a trip to New York City for the express purpose of exhibiting some samples of the stolen United States Government checks described above to said prospective buyer. The informant personally observed one of the sample checks and noted that it bore serial number 2834643 in the amount of One Hundred One Dollars (\$101.00) and some odd cents. According to the informant Robert Mylan is asking 20 cents on a dollar for these stolen checks.

(3) Also during the period May 3-10, 1976, Robert Mylan,

according to the informant, driving the above-described Lincoln, bearing New Jersey License number 777CYS, travelled to New York City where he met the aforementioned prospective buyer and turned over to this individual in excess of Eighty Thousand Dollars (\$80,000.00) in stolen negotiable United States Government checks for the sum of approximately Fifteen Thousand Dollars (\$15,000.00). The informant, who was in a position to personally observe some of the above checks, advised that one of these checks bore serial number 28348722 in the amount of Two Hundred Thirteen Dollars (\$213.00) and some odd cents.

(4) Records of the Division of Motor Vehicles State of New Jersey were checked by an Agent of the Federal Bureau of Investigation on April 29, 1976, which check revealed that New Jersey license 777CYS is registered to Robert E. Mylan, residing at 95 Tunes Brook Drive, Brick Town, New Jersey, on a 1975 green, 4 door Lincoln.

(5) By communication dated May 7, 1976, the Washington Field Office of the Federal Bureau of Investigation advised that inquiry at United States Secret Service, Washington D.C. (USSS) revealed United States Government checks bearing numbers 28348643 and 28348722 are valid and not in the name of Robert Mylan. USSS further advised that their inquiry at the United States Treasury Fiscal Services Division of Disbursements, Birmingham, Alabama, revealed that the above described checks were issued and placed in

the mail on April 29, 1976 for delivery to the respective payees. In addition, USSS advised that these checks were mailed care of U.S. Treasury Distribution, Rochester, New York and stolen in bulk either from a central post office facility or at an airport in the Rochester, New York area. If stolen in bulk or in mail pouch, USSS stated that the number of checks would be in sufficient quantity to be valued at one half million dollars.

(6) On June 1, 1976, the aforesaid informant advised that Robert Mylan would proceed to the Eastern Airlines Shuttle Parking Lot at LaGuardia Airport, Queens, New York with approximately Two Hundred Eighty Thousand (\$280,000.00) worth of stolen checks, dated on or about May 30 or May 31, 1976, to be sold to the prospective buyer on June 1, 1976 at the aforesaid location. The informant further advised that Robert Mylan would be driving to that location in the previously described 1975 Lincoln bearing New Jersey license plate number 777CYS and that the aforementioned stolen checks would be secreted in that vehicle.

(7) Verification by Agents of the Federal Bureau of Investigation that Robert Mylan was observed on June 1, 1976 driving the above described Lincoln north on the Garden State Parkway toward New York City.

(8) Information provided by the Kansas City Office of the Federal Bureau of Investigation that a shipment of Government checks dated May 31, 1976 were mailed to Rochester, New York on

May 2, 1976.

WHEREFORE, your deponent respectfully requests that a search warrant be issued authorizing your deponent and other agents of the Federal Bureau of Investigation to enter the vehicle known and described as a 1975 Lincoln bearing New Jersey license plate number 777CYS and there to search for and to seize the aforementioned quantity of stolen negotiable United States Government checks relating to a violation of Title 18, United States Code, Section 641, which are presently being possessed, concealed and retained in violation of law.

ARGUMENT

POINT I

APPELLANT TARKO HAS STANDING TO CONTEST THE LEGALITY OF THE SEIZURE OF THE GOVERNMENT CHECKS

The threshold issue in this appeal is whether the appellant John Tarko was an "aggrieved party" within the meaning of Federal Rules of Criminal Procedure, thereby conferring upon him the right to contest the legality of the search of Robert Mylan's car and attendant seizure of stolen Government checks.

In Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed 2d 697 (1960) Mr. Justice Frankfurter, speaking for an unanimous Court stated that when the Government charges an offense an essential element of which is possession, the defendant had standing. He explained the reasoning for this conclusion as follows:

As to the first ground, we are persuaded by this consideration: to hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. 362 U.S. p. 263

In the most recent case regarding this issue, Brown v. United States, 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973), the Supreme Court denied standing to thieves who

had sold their purloined merchandise to one "Knuckles" in whose warehouse they were seized pursuant to a defective search warrant. Because the goods had been sold prior to seizure and the term of the conspiracy charged terminated the day preceding the search there was no standing to contest the search. The Court stated:

In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants' (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.*

The application of the Jones-Brown test confirms that appellant Tarko possesses standing. Although not present in the automobile when searched, nor testifying to a possessory interest in the stolen checks**, the Government charged him with "receiv[ing], conceal[ing], and retain[ing] stolen Government" checks. One could hardly receive, conceal or retain anything unless one possessed it - possession is therefore, an "essential element" of the crime. Without possession, either

* The Court's conclusion regarding (c) was founded, as did the Court in Jones, upon the "contradictory positions" of the Government in charging a crime, of which possession is an essential element and denying possession for the purposes of standing. 411 U.S. p. 229

** As Tarko's standing was never contested below, and no hearing was conducted, there was no opportunity to comport with this alternative theory. Should this Court reject our contention regarding "automatic" standing, we submit the case should be remanded for a hearing with respect to appellant's interest in the checks and whether said interest, if any, establishes standing.

actual physical possession, or constructive possession, the charge could not be established. Teel v. United States, 407 F. 2d 604 (8th Cir., 1969).

In United States v. Price, 447 F. 2d 23, cert den. 404 U.S. 912 (1971), this Court recognized the "automatic standing" rule of Jones, and noted that it had been explicitly reaffirmed" in Simmons v. United States, 390 U.S. 377, (1968), 447 F. 2d at p. 29. Moreover, Judge Lumbard responded to the argument that a defendant would have standing only if actual physical possession alone was sufficient to convict:

We agree with these later decisions in holding that, as stated in Simmons, there is standing where possession is "an essential element of the offense." To rule otherwise would produce results which bear no relationship to the policies underlying the Fourth Amendment and the view expressed in Jones that the Government should not be allowed to take inconsistent positions, i.e., that a defendant did not have possession so as to be able to challenge the search, but is guilty of possession. 447 F. 2d at p. 29.

Moreover, the facts herein are more persuasive than in Price, as the Government alleged complicity of Mr. Tarko on the precise day that the search and seizure took place, i.e. June 1. This is not a case as in United States v. Cowan, 396 F. 2d 83 (2d Cir. 1968) where abandonment eliminated standing. Nor is it a case where proof of possession would not establish the crime, as in a charge of conspiracy. United States v. Sacco, 436 F. 2d 780 (2d Cir. 1971). Additionally, there

can be no viable contention that the checks are not the same charged in the indictment. cf. United States v. Tortorello 553 F. 2d 809 (2d Cir. 1976). Indeed in both Tortorello, supra, and United States v. DeMarco, 488 F. 2d 828 (2d Cir. 1973), each decided after Brown, this Court found standing under circumstances where the defendants were neither on the property at the time of the search, nor were found to have any possessory interest in the items seized. The legal right to contest the legality of the searches was founded upon the charge-in, Tortorello, receiving concealing and storing 250 boxes of stolen coffee and in DeMarco, possession of stolen property.

Consequently, appellant Tarko has standing to contest the validity of the search and seizure respecting co-appellant Mylan's car. United States v. Mapp, 476 F. 2d 67 (2d Cir. 1973) United States v. Pastore, 456 F. 2d 99 (2d Cir. 1972).

POINT II

THE SEARCH AND SEIZURE OF THE GOVERNMENT CHECKS WAS ILLEGAL AND UNCONSTITUTIONAL BECAUSE THE SEARCH WARRANT WAS NOT ISSUED UPON PROBABLE CAUSE, AS THE SOURCE OF THE INFORMANT'S INFORMATION REGARDING JUNE 1st WAS UNREVEALED

The standard for establishing probable cause has long been settled. In Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 509 12 L. Ed 2d 1509, (1964) the Supreme Court enunciated the oft-quoted elements:

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 692, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed, see Rugendorf v. United States 376 U.S. 528 was 'credible' or his information 'reliable.' [378 U.S. at p. 114].

This standard has been reaffirmed since Aguilar. Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, L. Ed 2d (1969). And while there has been speculation to the contrary, the Aguilar two-pronged standard continues with its full vigor and, has not been overruled by the Supreme Court's decision in United States v. Harris, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed 2d 723 (1971). See United States v. Karathanos, 531 F. 2d 26, 32 (1976).

The affidavit for the search warrant, which was the

only information presented to the magistrate, recites allegations the source of which is unstated. However, the affidavit is clearly drafted to give the appearance of reliability. The affiant asserts that the informant has provided information that has "led directly" to the recovery of \$70,000 of stolen negotiable securities. Of importance is the failure of the informant to identify those who possessed them. Indeed, rather than pinpointing the exact location of the securities, the information was merely vaguely characterized as leading "directly" to the securities.

Regarding Mylan's alleged prior sale of stolen checks, the affidavit is also woefully deficient.* He asserts that Mylan is the purveyor of the securities and, on April 29, was in possession of \$50,000 stolen negotiable securities.** How he obtained this information is not stated. His source extends only to two checks which were part of a shipment stolen within five to twelve days of the day when he "personally observed" the checks. At no time does he state he saw Mylan with them,

*The appellant asserts that whether the informant's prior information is reliable or not, the information regarding the June 1 transfer is crucial. This exposition is merely to contrast the meager information conveyed regarding the alleged prior transfer with the unsubstantiated assertions regarding June 1.

**This palpably false statement indicates the unreliability of this information. When the Agent's tried to verify the serial numbers of two checks, the information was received that the checks were placed in the mail April 29. Only unfamiliarity with the postal service or wishful thinking would cause one to conclude that Mylan would have the checks in New Jersey on the same day they were mailed in Birmingham, Alabama. [Supra, p. 5]

nor upon what information he alleges Mylan had possessed them. Significantly, neither the date of the exhibition of the "samples" or the alleged transfer of "in excess of Eighty Thousand Dollars (\$80,000) in stolen" checks is identified, only that the former was between May 3-7 and the latter between May 3-10. Clearly the informant was not present if, indeed, these events occurred at all.

Most importantly, the informant's contention regarding the June 1 transaction is barren of the circumstances upon which this information was gleaned. This deficiency was compounded by the failure of corroboration of the material elements of his statements, although easily obtained. It must be recalled that on May 7 the checks mailed April 29 had been reported stolen. The only verification regarding the relevant June 1 checks was that shipment of checks of unstated value had been made May 2. Yet they had not been reported stolen more than four weeks after mailing, presumably from Kansas City. In short, that which was previously easily and speedily verified was not on June 1, despite a lapse of a substantial period of time. Rather than indicating the reliability of the information it established the contrary.

As for the balance of the informant's recitation also there was no source stated. Although Chief Judge Mishler chose to find that the "informant was either

assisting Mylan in the sale of the stolen checks or was sufficiently friendly with Mylan to be in a position to observe the preparations for the sales or the actual sales themselves" there is no basis whatsoever supporting such a conclusion. That he could describe Mylan's car and the direction of his travels* was neither so unique as the information of an identified "special employee" in Draper v. United States, 358 U.S. 307, 79 S. Ct. 329 3 L. Ed. 2d 327 (1959) nor corroborative of criminal activity. The amount of checks carried by Mylan was verified only upon seizure which cannot be used to validate an otherwise illegal arrest. The informant's familiarity with or assistance to Mylan's operation as Judge Mishler had inferred would have enable him to pinpoint the exact date of the distribution of the prior shipment of checks in early May.

If anything, the affidavit establishes a distinct unfamiliarity with Mylan. He provided neither an address nor a description of him. Nor at any time did he say he saw or could it be inferred that he saw Mylan with the checks or

*Anyone could have learned of Mylan's car through a multitude of innocent circumstances. For example, merely having seen him driving. Familiarity with him does not support participation in criminal activity. Neither could the observation that Mylan was on the Garden State Parkway corroborate illegal conduct. Indeed, the residents of northern New Jersey would undoubtedly take umbrage at the contention that a person travelling North on the Garden State was headed exclusively for New York.

in negotiation for their distribution.* The affidavit was carefully drafted to avoid alleging that the informant had made such personal observations.** Of United States v. Cangiano, 491 F. 2d 906 (2d Cir. 1974).

*It must be acknowledged that personal observation is not the only method of establishing the reliability of the information. But, it is not alleged nor inferable that Mylan foretold the prospective exchanges or later admitted them. Harris v. United States, supra, at p. 12 . Nor was the informant's statement a declaration against his own penal interest. Admitting his own participation in the crime was assiduously avoided.

**The Government cannot rely upon the old bromide that the affidavit should not be interpreted with the same critical eye as one would a document prepared by a lawyer. There is in fact no evidence who prepared the affidavit whether an Assistant United States Attorney or one of the Agents. In either case it is carefully drafted document, prepared by a person conversant with the requirements of Aguilar. Thus the emphasis on those items "personally observed" and exposition of those allegations which are verified. Under these circumstances the information established reliability ought not be provided by judicial speculation but recognized for what those omissions were-intentional and calculated to circumvent the need for more precise reliable information.

In United States v. Karathanos, 531 F. 2d 26 (1976), this Court construed an affidavit with far greater indicia of reliability than in this case. One Athanasiou, an admitted illegal alien surrendered to Immigration and Naturalization and stated that numerous illegal aliens living with him at Steve's Pier I in Bayville, New York. He said there were at least eight others illegal aliens there, residing in squalid conditions. A search warrant was issued and seven illegal aliens were arrested on the premises.

Additionally and in sharp contrast to the non-existence of any prior independently verified criminal activity by Mylan or record of arrest or convictions of him, Steve's Pier I had been the site of the arrest of eleven illegal aliens in the prior five years.

The Government argued there, as Judge Mishler concluded in this case, that the circumstances gave rise to an inference that the other aliens had communicated their illegal status to Athanasiou. This Court rejected the contention saying:

To infer that the informant reached his conclusion in a reliable manner (e.g. through admission by the aliens) rather than in an unreliable manner (e.g. through rumor or assumption based on observations of physical appearance and the like) would be to permit a warrant to issue on the basis of a degree of speculation proscribed by the Spinelli-Aguilar test. While an affidavit supporting a search warrant should not be read in a grudging or technical manner, United States v.

Ventresca, 350 U. S. 102, 108-09, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), neither should it require the magistrate, or reviewing court, to use imagination to supply essential details critical to determining probable cause. See Aguilar v. Texas, 378 U.S. at 114-15, Giordenello v. United States, 357 U.S. 480, 486, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958). [531 F. 2d at p. 31].

The "imagination" necessary in this case exceeds the Government's improvisation which was rejected in Karathanos. In Karathanos face to face communication was inferable, and the natural camaraderie of persons in deplorable circumstances would cause an exchange of information ultimately revealing their illegal status.

Yet, here, there is nothing to indicate Mylan ever knew the informant--only that the informant knew Mylan's car. This is hardly the type of relationship which gives rise to an exchange of criminal communications. For aught that appears, the informant was basing his allegations upon rumor and surmise. If indeed there was a more reliable basis, the affidavit would have simply recited the source, precluding the necessity of judicial speculation.

Moreover, this is not a case, as United States v. Sultan, 463 F. 2d 1066 (2d Cir. 1972) where the identified informant was the defendant's cousin who conveyed an admission by the defendant, neither is there the personal observation noted in United States v. Burke, 517 F. 2d 333 (2d Cir. 1975)

[identified informant who had personally observed sawed off shotgun in defendant's possession]; nor was the informant admitting personal involvement in criminal conduct and identifying his source of contraband, United States v. Cangiano, 431 F. 2d 906 (2d Cir. 1974); see also United States v. Rollins, 522 F. 2d 160 (2d Cir. 1975). Mylan had no criminal reputation as in United States v. Harris, supra, p. . The incriminating information was not personally perceived as in United States v. Pond, 523 F. 2d 210 (2d Cir. 1975), where a station agent who had a perfect record of reliability and had developed as an expert "smeller" perceived the distinctive pungent odor of marijuana in suitcase and transmitted that information.

The affidavit reveals no information upon which the reliability of the informant's source of his information is established. Consequently, one prong of the Aguilar test remains unsatisfied, requiring recognition that the search warrant was not issued upon probable cause. Consequently the subsequent search and seizure was invalid.

POINT III

PURSUANT TO RULE 17 OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT HEREBY INCORPORATES BY REFERENCE THE ARGUMENTS CONTAINED WITHIN CO-APPELLANT'S BRIEF

CONCLUSION

FOR THE FOREGOING REASONS APPELLANT'S
CONVICTION MUST BE VACATED AND THE
MOTION TO SUPPRESS GRANTED.

DAVID W. McCARTHY
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Respectfully submitted,

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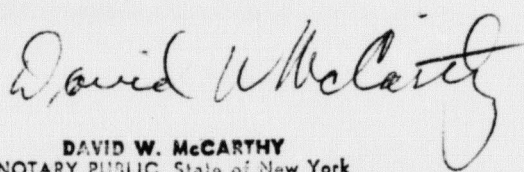
STATE OF NEW YORK)

ss.:
COUNTY OF NASSAU)

HELANA COLETTA, being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of age
and resides at 232 Ohio Street, Hicksville, New York.

On April 22, 1977 deponent served the within Brief and
Appendix upon David Trager, attorney for People in this action
at U.S. Attorney for the Eastern District, 225 Cadman Plaza, East,
Brooklyn, New York 11201 the address designated by said attorney
for that purpose by depositing a true copy of same enclosed in
a post-paid properly addressed wrapper, in--a post--office--
official depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Sworn to before me on
April 22, 1977.



DAVID W. McCARTHY
NOTARY PUBLIC, State of New York
No. 41-4525115
Qualified in Nassau County
Registered in Queens Co.
Commission Expires March 30, 1978



HELANA COLETTA